IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WATERFORD TOWNSHIP POLICE & FIRE RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff	19-CV-434-MSM
vs.	MAY 6, 2024
CVS HEALTH CORPORATION, et als, Defendants	VIA VIDEO CONFERENCE

BEFORE THE HONORABLE MARY S. McELROY

DISTRICT JUDGE

(MOTIONS TO DISMISS)

APPEARANCES:

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Via Video Conference

6 MAY 2024 -- 10:00 A.M.

THE COURT: Good morning. I'm just waiting for everybody to connect.

Are we ready to proceed on motions to dismiss which are at ECF 52 and 53?

MS. COLLINS: Yes, your Honor.

THE COURT: Okay. I'll ask counsel to identify themselves and the parties that they're representing for the record, please.

MS. COLLINS: Good morning. Melissa Collins of Williams & Connolly on behalf of the CVS Defendants.

THE COURT: Good morning.

MR. SHEKARCHI: Good morning, your Honor. Joe Shekarchi and John Rizio-Hamilton representing the Plaintiffs; and with permission of the Court I will turn over to John Rizio-Hamilton to make the formal argument. I wanted to just make the introduction.

THE COURT: Okay. Thank you, Mr. Shekarchi.

MR. DAWSON: Good morning, your Honor. Christopher Dawson also on behalf of the CVS Defendants. I will not be arguing this morning.

THE COURT: Okay.

MR. CHEPIGA: Good morning, your Honor. Geoffrey Chepiga for Paul Weiss on behalf of the Aetna

Director Defendants.

THE COURT: Okay.

MR. RIZIO-HAMILTON: And your Honor, this is John Rizio-Hamilton on behalf of the lead Plaintiff. I should note that my partner, Mr. Jesse Jensen, is also present, and I'm prepared to argue the CVS Defendants' motion, and Mr. Jensen is prepared to handle the Aetna Director Defendants' motion.

THE COURT: Okay.

MR. JENSEN: Good morning, your Honor.

THE COURT: Good morning.

Okay. So sort of for ease of argument and organization, I just want to sort of let you know that the reason that I asked for a hearing and that we're having this hearing is I'm interested in your take on the impact of the *City of Miami Fire Fighters v. CVS* on the Amended Complaint because that opinion affirmed our grant of motions to dismiss in the companion litigation, as you know.

Why don't we start with the argument of the CVS Defendants regarding motion to dismiss.

MS. COLLINS: Yes, your Honor. And as you just mentioned, this case and the disclosures at issue have a bit of history. I'm sure your Honor is familiar with some of that and so I will try to be brief with the

background; and then I'm going to turn to the two aspects of the current Complaint that Plaintiff contends are different from the prior cases, so, different from *Fire Fighters*, but -- and the *LPF* case that I will also discuss. Those are customer loss allegations and its prescription rollover allegations. As I'll explain, those allegations have been considered and rejected by prior courts and do not state a claim here either.

This case is primarily about the goodwill of CVS's Long-Term Care, or LTC unit. I'll be very quick with the summary of the underlying disclosures, but I'm happy to go into more detail if the Court would like.

The first time that the LTC unit goodwill was broken up specifically was in the third quarter of 2016 10-K. There, CVS disclosed that the LTC unit's value exceeded its carrying amount by 7 percent. That 7 percent was repeated, was repeated in the 2016 10-K, which is incorporated into the offering documents at issue in this case. By the 2017 10-K, which is also part of the offering documents here, CVS disclosed that the fair value of the LTC unit had exceeded the carrying amount by only 1 percent, which was a decline from the prior 7 percent. In connection with this change, CVS disclosed that our multi year cash flow

projections for our LTC recording unit had declined from the prior year due to customer reimbursement pressures, industry trends such as lower occupancy in skilled nursing facilities, and client retention rates. The disclosure went on to warn that if CVS didn't achieve its forecast, quote, It is reasonably possible that the operational performance of the LTC reporting unit could be below our current expectations in the near term and the LTC reporting unit could be deemed to be impaired by a material amount.

In the subsequent months those challenges did continue. CVS did not meet its forecast, so it took a series of two goodwill write-downs; first in August of 2018 and then in February of 2019. That second goodwill write-down spurred a series of lawsuits, all arguing that CVS's disclosures were misleading because CVS should have written down the goodwill of its Long-Term Care unit earlier. Two of those cases wound up in front of your Honor; this case, and the 1934 Act case *Fire Fighters*, which you've mentioned. Another case, *Labourers' Pension Fund, LPF*, was proceeding in New York state court, and yet another in Rhode Island state court. Both are 1933 cases, like this one. All of those other cases have been dismissed with prejudice.

So this Court looked at the same disclosures and dismissed *Fire Fighters*. It was a 1934 Act case, but your Honor dismissed because there were no false or misleading statements, which is the same inquiry that is at issue here for the same disclosures. This Court concluded even assuming significant customer loss, quote, CVS did publicly disclose to investors the challenges plaguing the LTC business that could lead to a goodwill impairment; and, quote, No reasonable investor could have believed that the issues the plaintiff claimed were omitted did not exist.

The First Circuit then affirmed, concluding that your Honor's, quote, assessment was on the mark. Alleging customer losses was not enough. To state a claim those allegations would have had to have been, quote, inconsistent with the company's goodwill disclosures, and they were not.

Importantly, the First Circuit also looked at a proposal for an amended complaint in *Fire Fighters* and concluded that the new allegations that the Plaintiffs relied on there still did not contradict CVS's disclosures.

In the other two cases, in *LPF* the New York Appellate Division dismissed 1933 Act claims identical to the ones at issue here, holding as to the goodwill

claims that there were no actionable statements under any prong of Omnicare and that CVS's risk warnings were not misleading in light of the, quote, total mix of information. The Rhode Island Superior Court also dismissed the same 1933 Act claims, adopting the persuasive reasoning and findings of this Court, the First Circuit, the New York Appellate Division, and agreeing, quote, that plaintiffs failed as a matter of law to show that CVS made actionable false or misleading statements. So --

THE COURT: Can I interrupt you there. So are you arguing that it doesn't make a difference that this case isn't pled in fraud, that the difference is immaterial because there are no false or misleading statements so they don't get to the, whether the heightened pleading standard has been met?

MS. COLLINS: Correct. I think it doesn't make a difference that this case is not pled in fraud because you can accept all of their allegations as they were pled as true, and you look at the disclosures in context and they're not misleading to a reasonable investor. I also think it's important when you're thinking about the sort of what needs to be pled here, to look back at *Omnicare*, which is a Section 11 case, a 1933 Act case which talks at length about what a

plaintiff needs to plead to show an omission of a fact to state a claim that an opinion statement, like the goodwill statements here, would be misleading. And they say that's no small task for an investor; you have to actually lay out the things that would not, cannot be squared with what a reasonable investor would take from the opinion. So the fact that this is not pled in fraud I think does not make a difference in the outcome.

Okay. And so Plaintiff here does not argue that your Honor or the First Circuit misapplied federal securities law; instead, it's trying to distinguish its complaint from others. It focuses in its opposition on sort of two groups of factual allegations that it says are different. The first is the allegations about customer losses, and the second are the allegations about rollover practices. As I'll explain, those allegations not different from what has been looked at from prior courts, and they don't change the outcome that this complaint should be dismissed. And while I do think it's helpful to know why this is not different from the other cases, I also want to be clear that this case should be dismissed even if it were the first case filed, dismissed on the merits, as this Court and the prior courts have all reached the same conclusion,

applying the same federal securities laws to the same disclosures and the same underlying events, we think it's the right conclusion because CVS's disclosures were not misleading.

So -- did you have a question? Sorry.

THE COURT: No.

MS. COLLINS: Okay. I'll start with the customer losses. So Plaintiff contends that its Complaint pleads new and different facts that haven't been considered by any other court about the customer losses that the LTC business was experiencing, and that also those facts they plead are sufficient to state a claim about CVS's goodwill disclosures. Plaintiff is incorrect on both accounts.

So first, in its briefing Plaintiff emphasizes three ways in which it says its customer loss allegations are more robust than the other complaints. The first is an allegation that CVS lost 25 to 33 percent of the LTC business; the second is an allegation that CVS held a "come to Jesus" meeting in 2016; and the third is an allegation that CVS acquired other pharmacies but lost many of those customers. These are repeated over and over throughout Plaintiffs' brief as reasons why its complaint is different. But these are not new allegations. These same allegations

were in the proposed amended complaint in *Fire Fighters* that the First Circuit considered and rejected. Those plaintiffs in *Fire Fighters* lifted the exact same 25 to 33 percent and come to Jesus allegations directly from this Complaint, explicitly relying on this Complaint and its confidential witnesses for those allegations. And that complaint also copied allegations about failed acquisitions that relied on this case's confidential witnesses.

But none of that moved the needle for the First Circuit, which looked at the allegations the plaintiff there relied on as saying that they now would overcome the deficiencies in *Fire Fighters,* and the First Circuit concluded that even those allegations did not, quote, connect defendants' public statements with contradictory contemporaneous facts, or, quote, demonstrate that the further anecdotal losses described by the new CWs materially exceeded the losses recognized by CVS.

And the First Circuit wasn't alone in that. The *LPF* court considered and rejected a substantially similar allegation that the LTC business had lost up to 25 percent of its customers. And your Honor in *Fire Fighters* credited significant customer losses and in concluding that the disclosures were not misleading.

So they're not new allegations, and they don't state a claim here any more than they do elsewhere.

Plaintiffs' main theory is that its complaint shows that the LTC business's goodwill was already impaired at the time of the offering documents, but that's just a disagreement with CVS's accounting judgment and it's not actionable, as this Court recognized in *Fire Fighters*. The statements about goodwill are subjective statements of opinion evaluated under the Supreme Court's *Omnicare* decision; and I can walk through that in great detail if you'd like, but I'll try to keep it brief. The bottom line is that *Omnicare* does not allow a plaintiff to state a claim just by disagreeing with how CVS assessed the facts that went into its goodwill analysis. *Omnicare* recognizes that opinions rest on competing facts and only provides for liability or omission of fact when that fact, quote, cannot be squared with the fair reading of the disclosures ans context.

And we cite numerous cases in our brief, including *GE*, *Ascena Retail Corporation* and, of course, *Fire Fighters*, all dismissing where plaintiffs raise the same sorts of allegations as here, that a company should have recognized goodwill impairment earlier because the plaintiff can point to signs of trouble in

the business.

That dismissal is even more appropriate here in light of CVS's disclosures. Far from the rosy picture that Plaintiff tries to imply, there's no dispute that CVS disclosed declining fair value in the LTC unit, lowered financial projections for a number of reasons, including client retention rates and a near term possibility of impairment.

This Court already looked at those disclosures in *Fire Fighters*, and that same analysis applies here. You credited customer loss, even assumed for the sake of argument that there were omissions about customer loss, and still concluded that CVS had disclosed the relevant challenges and no reasonable investor could have believed the issues did not exist.

These Plaintiffs, the Plaintiff here does not raise any new issues, (indecipherable) but the same types of issues that were addressed in *Fire Fighters*, and so the same analysis applies.

To the extent that Plaintiff argues that referencing customer retention rates is somehow insufficient in the face of its allegations of significant customer loss, that's incorrect. In the disclosures it was not just a stray reference of customer retention rates being an issue; it was in the

context of explaining that financial projections had decreased, fair value had gone from 7 percent above carrying value to only 1 percent above carrying value, so it's directly tied to negative financial impact on the LTC business.

A securities plaintiff is not entitled to its preferred wording in disclosures, and, as this Court said, quote, CVS was under no obligation to spell out the extent of customer retention difficulties simply because it mentioned them. The same remains true today as it was in the *Fire Fighters* decision.

So that's customer losses. There's no basis in the Complaint to conclude, even crediting all about Plaintiffs' allegations that they rendered CVS's statements misleading.

The other supposed difference is rollover allegations.

THE COURT: Excuse me; I apologize.

MS. COLLINS: Do you want a minute?

THE COURT: You can proceed.

MS. COLLINS: I'll also take a drink.

Plaintiffs' theory here on rollover allegations relies on allegations about prescription filing practices that are lifted wholesale from an entirely different lawsuit, a false claims act case called

Bassan. It's referenced in the Complaint by that name. That case was sealed until December 2019, long after the disclosures and the write-down at issue here, after even this case started. It's still going on in the Southern District of New York. It's in discovery; there's been no finding of any misconduct by CVS.

Unlike the other customer loss allegations that we were just discussing, these are not unique to Plaintiffs' complaint. They've already been dismissed in other cases. The *Fire Fighters* plaintiffs literally copied and pasted rollover allegations from this Complaint into their proposed second amended complaint, and that made no difference in the First Circuit. The rollover allegations were referenced in the First Circuit briefing and still the First Circuit concluded there were no contradictory contemporaneous facts in the new allegations compared to CVS's disclosures.

And these rollover allegations were also in the Rhode Island state court, which was dismissed. And those dismissals, again, are with good reason. CVS disclosed it was being investigated, which is what it knew. The complaint does not allege that CVS knew of the litigation before it was unsealed in December 2019, but Plaintiff nonetheless argues that CVS's prior

disclosures were somehow misleading because they didn't disclose the later allegation. The theory goes nowhere for a couple of reasons, and first and foremost courts recognize that securities disclosure is not, quote, a rite of confession. Securities law is very clear that companies do not have to accuse themselves of uncharged, unadjudicated misconduct. The same goes with financial statements. They don't automatically become misleading just because a company does not disclose some possible misconduct may have contributed to the results. We cite the case law in our briefs. I'm happy to discuss further if you'd like, but this is not a controversial proposition. Plaintiffs don't dispute it or try to distinguish our cases. They don't in their briefing point to any cases that apply their theory. They just ignore this legal point which is dispositive.

Under Plaintiffs' theory, CVS would have been required to assume that an investigation was ultimately going to result in a lawsuit, assume that they would be found at fault in the lawsuit, which still hasn't happened, and then somehow account for that in their financial statements. And that's not the law, so your Honor can stop there because that's what Plaintiffs' theory of the case would require.

But even if the Court were to go further, their particular theory makes no sense in the context of Plaintiffs' case. This case arises out of a goodwill impairment. Plaintiff is supposedly pouring out facts that in its view would show that goodwill was impaired. But the rollover allegations have nothing to do with the goodwill calculation. Plaintiff does not allege that anything related to the rollover actually factored into the goodwill impairment that CVS announced.

The only supposed connection that Plaintiff attempts to make in its briefing to goodwill is the argument that the potential for litigation would be a trigger for goodwill impairment testing. But that also failed. First, the portion of the accounting guidance that Plaintiff relies on in its Complaint refers to actual litigation, not hypothetical, unknown litigation, as one of the events and circumstances that a company assesses when determining whether to test for goodwill impairment; and, second, once you're even considering those factors, that's back to a disagreement with CVS's accounting judgment regarding how to assess what necessitates goodwill testing. It's just not the case that you have to test for goodwill impairment every time there's even the potential for a lawsuit; and that's all there was here.

So one final note on rollovers. Plaintiff also likes to use in its Complaint and its briefing the phrase "inflated revenue" to say that goodwill was impaired. It's not, it's not entirely clear to me what Plaintiff means by that. CVS booked revenue for sales that it actually made to real customers. There are no allegations those numbers were recorded incorrectly. And if Plaintiff is trying to say that CVS made sales that it shouldn't have, that's back to assuming misconduct and those legal principles that you don't have to, companies don't have to accuse themselves of misconduct or alter their financial statements because some suspectible (phonetic) misconduct may contribute to the numbers.

Very briefly, my last point, I've been focusing mostly on the goodwill disclosures. That's the focus of the briefing, and I think that's the core of the case here. Plaintiff also tries to claim that CVS's risk warnings were misleading and the disclosures violated Regulation S-K, so I'm just going to briefly address those.

Both theories are grounded in the notion that CVS's disclosures did not adequately indicate the risks that were affecting the business. These theories were dealt with and dismissed in other cases: The *LPF* in

Rhode Island state court, plaintiffs alleged both. The *Fire Fighters* case involved the risk warnings.

Plaintiffs don't contend their arguments are different here; they just go back to the same customer loss allegations and rollover allegations that they relied on for their other arguments, and they're no more successful here than elsewhere. Plaintiffs' approach is to cherry-pick statements from the CVS disclosures as a whole, but ignore the context of CVS's LTC-specific disclosures and then complain that the impact of the risks on LTC unit weren't disclosed the way the Plaintiff wanted. But putting a Reg S-K or a risk warning on the Complaint doesn't fundamentally change Plaintiffs' theories or the reasons why they fail. Fatal to all of these theories is that CVS did disclose customer losses negatively affecting the LTC unit. Plaintiffs' insistence on an earlier goodwill write-down is still just a disagreement with CVS's accounting judgment, and CVS is under no obligation to accuse itself of misconduct. When you look at the disclosures in context from your Honor's *Fire Fighters* opinion, no reasonable investor could have believed that the issues Plaintiff claims were omitted, did not exist. The same is true here.

So for all of those reasons and the reasons in

our brief, we respectfully request that the Court dismiss the Complaint with prejudice.

THE COURT: Okay. Thank you, Ms. Collins.

I don't know if you guys can hear the drumbeat in the background, but there's a protest going on across the street, so if it disturbs you let me know.

MS. COLLINS: I cannot hear anything.

THE COURT: There's nothing I can do about it, but at least you'll know.

Mr. Rizio-Hamilton, would you like to respond before we then get to the Aetna Defendants' motion, or would you like to hear both motions first?

MR. RIZIO-HAMILTON: I would like to respond, if that's okay with you, your Honor.

THE COURT: Fine with me.

MR. RIZIO-HAMILTON: Thank you so much.

Let me begin where your Honor began, which is, how does the First Circuit's decision in the 10(b) case affect this one; and I think that the theme of Ms. Collins' presentation is that it requires dismissal of this case, and I respectfully very much disagree with that, and I'd like to explain why.

So I think first it's important to understand exactly what the First Circuit held, and what the First Circuit held is set forth on page 31 of that

opinion. And it says, (Reading) Close review of the complaint reveals that despite its length it fails to allege sufficiently specific facts about the state of the LTC business and particular point in time to enable us to conclude that any of the goodwill write-downs were too late or that any of defendants' alleged misstatements contradicted the state of the business as it then stood.

So the principal failing of the complaint in the 10(b) case that the First Circuit honed in on was a factual one. The First Circuit did not say that these disclosures were inactionable as a matter of law. Even though the defendants had argued for that vociferously in their papers, the First Circuit rejected that concept and said that the complaint failed on its facts.

Now, our Complaint succeeds on the facts where the 10(b) complaint failed, and that's because we do allege specific facts about the state of the business at particular points in time. In our case the key moment in time legally is when the offering documents became effective on February 9th, 2018. That's when the false or misleading or incomplete nature of those documents is judged in a securities act case. And what we allege is that by that time, and particularly by the

end of 2017, the long-term care business had lost between 25 and 33 percent of its customers, which is an allegation that wasn't present in the 10(b) case. And so we give a very specific and detailed allegation, and that's paragraph 114 of the Complaint, about the extent of the business loss and precisely when it occurred. So that's big picture, point one.

The other set of allegations that we have that was not present in the 10(b) case does concern the rollovers, and we allege from the time Omnicare was purchased, up until early 2018, it was engaged in inappropriate rollover practices pursuant to which it was dispensing hundreds of millions of dollars worth of prescriptions a year without a valid prescription because they had expired. That too is an allegation that we situate very specifically as of a point in time prior to when the offering documents became effective. It was lacking in the 10(b) case.

Another big picture point I want to make here, your Honor, is that because the principal failing that the First Circuit identified in the 10(b) was a factual one, the fact that our allegations are judged under Rule 8 does matter. You know, Rule 8 controls here. It's not the heightened pleading standards of the PSLRA which requires a degree of factual specificity we're

not held to. And so when you couple those very specific factual allegations with the fact that we're judged under a Rule 8 standard, that solves the main problem that the First Circuit identified.

Now, there's something else which is very important. This case presents a particular species of legal claim that was not and could not have been an issue in the 10(b) case, that your Honor has never assessed in this case, and that the First Circuit didn't rule on in this case, and it's fundamentally different from the things that your Honor and the First Circuit considered; and that's the Item 303 claim.

The reason it's fundamentally different is that the Item 303 claim does not require us to show that a statement was false or even misleading. It is what's called a pure omissions claim, and this is demonstrated by the First Circuit's decision in the *Silverstrand* case, which is the First Circuit's seminal decision on Item 303. And it was most recently reaffirmed about six weeks ago by the United States Supreme Court in the *MacQuarie* decision. Since that hasn't been cited in the briefing, I'll just read the cite into the record. It's 144 S.Ct. 885 at page 891, and it's a pure omissions claim that is uniquely available under

Section 11 of the Securities Act that, as the Supreme Court held in *MacQuarie,* is not available under Section 10(b) of the Exchange Act.

The reason that fundamentally changes the analysis is because you do not have to show that a statement was misleading to plead an Item 303 claim. All you have to show is that the specific information that Item 303 requires to be disclosed was not fully and explicitly disclosed in the offering materials; and here, that information that was required to be disclosed under Item 303 absolutely was not, and that's quite separate and apart from whether the disclosures that were made were misleading.

What wasn't disclosed specifically that Item 303 requires? Two things. One was the known material trend of highly significant adverse business loss on the order of 25 to 33 percent in the Long-Term Care unit. That was a trend that was obviously known. It was reported internally repeatedly and actually addressed in the state of the company conference calls, as we allege in paragraph 114 and others in that section of the Complaint. It was the subject, in fact, of that November 2016 come to Jesus meeting that involved some of the most senior executives of the company, including --

THE COURT: Can I stop you for a second. Can you give me that cite again because I don't think I got it correctly.

MR. RIZIO-HAMILTON: The cite from the Supreme Court case?

THE COURT: Yes.

MR. RIZIO-HAMILTON: Yes, your Honor. It is 144 S.Ct. 885 and the pincite is 891. The name of the case is *MacQuarie v. Moab.*

THE COURT: Okay. Thank you.

MR. RIZIO-HAMILTON: And, you know, what *MacQuarie* held, and I think this is really significant for the purposes of our discussion and particularly your starting point, your Honor, is that this Item 303 pure omissions claim is not available under Section 10(b). That's what the Supreme Court said. And the Supreme Court said it's uniquely available under Section 11 and Section 11 only. So it's a pathway to liability that's unique; and as I'll talk about in a moment, under prevailing First Circuit law, which is set forth in that *Silverstrand* case that I mentioned, it's a really rigorous disclosure requirement.

THE COURT: Okay. I just want to, so that we're clear here, this case was only issued April 12th of

this year, so I intend to let the parties address it in no more than three pages post-hearing if they wish to, all of the parties, okay? No more than three pages.

MR. RIZIO-HAMILTON: Okay.

THE COURT: All right. Go ahead. Keep going. I didn't mean to interrupt you.

MR. RIZIO-HAMILTON: No, not at all, and we thank you for the opportunity.

So what wasn't disclosed here that Item 303 required? Two things principally, although the Complaint lists others, but I'd like to focus our discussion on the main two.

THE COURT: Okay.

MR. RIZIO-HAMILTON: And these are set forth in paragraphs 307 and 308 of the Complaint. Number one, the known material adverse trend of business loss within the Long-Term Care unit on the order of 25 to 33 percent of total customers as of year-end 2017 before the offering documents became effective. Number two, the known uncertainty -- and this is significant. Item 303 does not require that you must have certainty as to whether you've done something illegal to trigger disclosure. You are required to disclose known uncertainties under Item 303. So with respect to the rollovers, the known uncertainty that the company had

engaged in these practices to a material degree, and then it called into serious question their ability to generate the hundreds of millions of dollars that they had been generating pursuant to these practices. And I know Ms. Collins said there's been no adjudication of wrongdoing, but the fact of the matter is it doesn't take much thought to understand that you can't dispense regulated medications without a prescription.

So those are the two disclosures that were required under Item 303. Neither were made. And the First Circuit's decision in the *Silverstrand* case tells us a lot of really important things, and it's really the most important decision to this branch of our claim because, again, this hasn't been passed upon by either your Honor or the First Circuit yet.

And what *Silverstrand* tells is, number one, Item 303 is a pure omissions claim. It does not require there be any misleading statement, and, in fact, in *Silverstrand* there was no misleading statement. Number two, in *Silverstrand,* much like the Defendants are trying to do here, the defendants argued that the disclosures they had made in the offering documents were more than adequate to satisfy the Item 303 obligation. And they were able to point to some very what the First Circuit called detailed

disclosures about what had been going on there. They were developing an iron replacement drug, and the plaintiffs claim that they failed to disclose that there had been 23 serious adverse events since the time the drug had received FDA approval, and they pointed to disclosures in the registration statement to the effect that -- which the FDA approved, by the way -- to the effect that during testing there had been associated serious adverse events with the drug, including really, really dangerous ones like anaphylaxis that could cause death, as well as other very detailed disclosures about the issues they had encountered during the process of testing the drug and obtaining FDA approval; and the First Circuit said that's not enough to satisfy your 303 obligation. It's not enough to disclose some degree of problem to satisfy Item 303. What you have to disclose is the actual full trend that you are encountering at the time.

And so here, while Defendants' disclosures may have touched upon some problems, they actually didn't go as far as the disclosures that the First Circuit rejected in *Silverstrand*, which explicitly said that the product is tied to some serious adverse events including very dangerous ones like anaphylaxis; and they did not disclose in all events fully and

explicitly, as Item 303 requires, that the long-term care business had lost between 25 and 33 percent of its customers and that there was a known material uncertainty as to the rollovers.

Now, Ms. Collins said that the essence of the rollover claim is that we allege that they didn't disclose the allegations in the *qui tam* complaints, which weren't unsealed until after the vote in this case. That's not so. That fundamentally misconstrues the essence of our allegation.

The essence of our allegations is that they did not disclose underlying practice which they knew was improper. How do we know that they knew it was improper? Well, at paragraphs 193 through 220 of the Complaint we set forth in great detail a series of internal communications at Omnicare and CVS through which they recognized over the course of years that their systems had this failing where they continued to dispense medication after the prescription has expired. In fact, we cite multiple and quote multiple internal audits that Omnicare and later CVS conducted, and we quote employees from e-mails saying that the scope of the issue is huge. And we allege quite specifically in paragraphs 219 and 220 that not only was this problem known, but it was known to affect approximately

24 percent of the facilities through which they dispense prescriptions. So it was a significant and known issue, just like the business loss was a significant and known trend.

And so this is something that neither you nor the First Circuit has passed upon yet, and it's something that you have to consider anew and you have to consider it under the really relaxed pleading standard of Rule 8, which in *Silverstrand* the First Circuit said imposes a relatively minimum burden. And you have to consider it under the instruction of the First Circuit's opinion in *Silverstrand*, which confirms that no misleading statement is required to state this claim and that half-measured disclosures or disclosures that touch upon some problems but don't fully disclose the known tend and uncertainties are not enough to win dismissal at the pleadings stage.

Now, Ms. Collins mentioned that the Item 303 claims were presented in the New York state court case and the Rhode Island state court case, and while that much is technically true, the fact of the matter is that the New York state court complaint was severely deficient in two factual respects: (1) is that it didn't include any allegations about the rollovers at all, and, (2) is that the sole allegation it included

about the loss of business was a completely unsubstantiated, unadorned allegation that the company had lost between 10 and 25 percent of its business.

That allegation is not only less than what we allege, but it is totally unsupported. We submitted the complaint to your Honor as an exhibit to my declaration, and I implore you to take a look at it, because when you look at that complaint and compare it to ours, and particularly compare our paragraph 114 to the completely naked assertion in the New York state court complaint, you will see that our Complaint is head and shoulders above that one in terms of factual specificity and the numbers themselves.

With respect to the Rhode Island complaint, the court didn't grapple with the factual allegations in that case, and the factual allegations were far less specific than ours. I mean, I've looked at the complaint and I don't see that it contains any real allegation, much less a substantiated one, about how much business was lost and when. And with respect to the rollovers, I don't see that it contains any real allegations about the materiality of the rollovers that we set forth in great detail. But more than that, the Rhode Island state court didn't even assess it on the merits. It held that the complaint was barred by

collateral estoppel. So it's not a judgment on the merits that your Honor can really take guidance from. And the Defendants here don't argue collateral estoppel. They kind of hint at it, but they don't really argue it, and they couldn't because under federal law it's not available to them.

We get our own fresh look under federal law, and that's really what we're asking your Honor to do here; and we don't think the First Circuit decision precludes it, particularly with respect to this Item 303 claim which the First Circuit has never passed on.

Now, there's just a couple more points that Ms. Collins made that I want to touch on, and I'll do it briefly, as briefly as I can. So Ms. Collins mentioned that the First Circuit effectively considered our allegations by way of its review of your Honor's denial of the 10(b) plaintiffs' motion to amend the judgment. So I think it's important to understand first things first, which is what your Honor held on that motion.

What your Honor held on that motion wasn't that those allegations failed to state a claim. Your Honor held that the 10(b) plaintiffs unduly delayed at seeking leave to amend. Your Honor didn't consider those allegations on the merits. So your Honor has

never passed on the allegations that were lifted from our Complaint, much less under the Rule 8 standard for a securities act claim, much less under Item 303.

On appeal, the First Circuit merely found that there was no clear error or manifest injustice in your Honor's decision. The suggestion that the First Circuit substantively evaluated, much less deeply analyzed the merits of our factual allegations, is not true. Nowhere in the First Circuit's opinion did it analyze whether our allegations were sufficient to state the securities act claim for an Item 303 omission or a misstatement under a Rule 8 standard. That analysis does not appear in the First Circuit's opinion.

Now, with respect to the disclosure itself, I've already made the point multiple times that we can plead the Item 303 claim without showing a misleading statement, and I think we've done that. I think, respectfully, we've also shown that the statements were misleading in light of our enhanced factual allegations. There's a big difference between what Defendants disclosed and what we allege was actually happening based on our detailed factual allegations at points in time.

In sum and substance, what Defendants disclosed

was that the goodwill impairment was like at the line, like by the time the 2017 10-K is filed Defendants are saying we're like at the line of a goodwill impairment and if things don't go as well as we expect it's reasonably possible there could be a goodwill impairment. It's one thing to say that the impairment is at the line. It's another thing to say that you crossed over it. And we allege sufficiently that they had crossed over it because by the time that disclosure was made, 25 to 33 percent of the business had been gone. That's more than --

THE COURT: Were there offsets, though? That's one of the criticisms that the First Circuit had in the *City of Miami* is that the complaint didn't give absolute numbers, it gave, you know, losses without offset gains being noted.

MR. RIZIO-HAMILTON: So we do give in paragraph 114 the absolute number, and we use the phrase as a whole, okay? Our paragraph 114 is the one place in our Complaint or in any complaint that's been filed in these cases where any plaintiff has given a number that is all in net, okay, that as a whole; and in our paragraph 114 we say that it was widely reported that throughout the company that by 2017 the company had lost between 25 to 33 percent of the Omnicare

business as a whole.

THE COURT: As a whole, okay.

MR. RIZIO-HAMILTON: Yes. And so that's why I think our Complaint is fundamentally different. And, you know, Ms. Collins noted that the company disclosed that it had lowered its multi-year projections. This much is true; they did say that. But what is a reasonable investor to take from that? And a reasonable investor, to my way of thinking, wouldn't take from that that between 25 and 33 percent of the business had evaporated because they don't know what the projections had been lowered from and to. For all they know CVS could have had a really highly profitable projection that they lowered to a mid-level profitable projection, or CVS could have a mid-level profit projection originally that they lowered to flat.

And, you know, further sort of cementing the point, your Honor, later in the disclosure CVS says two things that would give a reasonable investor no reason to believe that 25 to 33 percent of the business had been gone. They said that the goodwill remained intact. All the goodwill that they originally reported, they said, remained intact. They did say we're at the line, but they didn't say we crossed it. And they further say later in that same disclosure, and

this is in paragraph 278 of our Complaint, they say that they're actually assuming future script growth from senior living initiatives and the impact of acquisitions. And so they're making positive representations in the same disclosure -- which, by the way, we allege are directly contradicted by the report of former employee Ron, in paragraphs 103 to 106, who said that those assumptions were completely baseless and made, in fact, for the express purpose of handing off a goodwill impairment.

So when you look at that disclosure as a whole, I agree that it for a reasonable investor that the goodwill was at the line. But we allege that it was far worse than that. It crossed the line, because 25 to 33 percent of the business had been lost to Omnicare as a whole and that wasn't disclosed.

Now, the last two points I want to address that Ms. Collins made were, you know, she mentioned this case law that there's no duty to disclose uncharged criminal conduct. And, you know, as a legal principle I think that's kind of okay as far as it goes; but it again sort of misses the basis for our claim, which is that Item 303 requires you to disclose a material trend or uncertainty, and that's true quite regardless of whether the conduct is criminal and whether it's

charged or uncharged. The case, the principal case that they cite for their legal principle is a Second Circuit case that actually didn't involve an Item 303 claim, it's *City of Pontiac*. And the trends and uncertainties that you see in the Item 303 cases quite often don't involve potentially criminal conduct, whether charged or uncharged, but they're required to be disclosed anyway. That was true in *Silverstrand*, it was true in the *Litwin v. Blackstone* case that we cite from the Second Circuit, and it's true in the *Ikanos v. Panther Partners* case from the Second Circuit that we cite, the Panther Part -- that *Silverstrand* cited with approval. So there is a disclosure duty here, it's under Item 303, and it doesn't turn on whether the conduct is criminal or charged or uncharged.

The last point I want to make on this issue is that in the *City of Pontiac* case, if you drill down to the district court decision that they're affirming there, you can see the disclosure at issue that was made there that insulated the company from liability; and now I'm talking about 2012 Westlaw 4471265 at page Star 29. The disclosure there is so much more extensive and robust than what CVS said here. CVS said here, you know, we got a document demand from the Department of Justice related to our cycle fill

process. That was it.

If you look at the disclosure that provided a safety in the *City of Pontiac* case, you will see that it discloses that the DOJ and SEC are examining the conduct of UBS in relation to cross-border services and in particular examining whether clients sought to evade their U.S. tax obligations from 2000 to 2007, and it goes on. It's like a giant paragraph that discloses far more specific and robust facts about the nature of the potential misconduct; it's stoked, and it's time frame than was ever disclosed here.

And now, the last point I want to make is that Ms. Collins asserted that there was no connection between the rollovers and goodwill. That's untrue. There are two pled connections between rollovers and goodwill. The first is that the rollovers, as we allege in paragraphs 219 and 220, accounted for hundreds of millions of dollars of revenue a year, and that is a significant piece of revenue that is at minimum uncertain, okay? Second, in paragraph 274 in the Complaint we quote CVS's own statement drawing the connection, and they say that their goodwill values could change if, for example, there are adverse legal or regulatory actions or developed. And so CVS itself acknowledged a connection between practices that

potentially violate regulations and the goodwill valuation.

So with that, your Honor, unless you have any other particular questions for me, I'm happy to conclude.

THE COURT: No.

I'd like to hear briefly from the Aetna Defendants, and then if you have response to that; but we're an hour into our hour hearing, so.

Mr. Chepiga.

MR. CHEPIGA: Yes, your Honor. Thank you, your Honor. Geoffrey Chepiga from Paul Weiss for the Aetna Director Defendants.

As we submitted in our briefing, your Honor, the Aetna Director Defendants are not proper defendants and do not belong in this case. I'd like to just start with the key point is that we agree with everything that Ms. Collins said and argued, that there are no misstatements or omissions in this case, just as your Honor found and just as the First Circuit affirmed. And because there are no misstatements or omissions, the Complaint should be dismissed in its entirety on that ground. If you agree with that, you don't need to reach any of the claims against the Aetna Directors. Ms. Collins' arguments on misstatements and omissions

dispose of the entire case. But in all events there are additional infirmities in the claims against the Aetna Directors that require dismissal at the pleadings stage.

As we set forth in our papers, your Honor, the Aetna Director or former directors of a separate publicly-traded company, Aetna, that was acquired by CVS in 2018. The alleged misstatements in this case concern disclosures that CVS made in its SEC filings regarding its acquisition of Omnicare back in 2015, so prior to the CVS acquisition of Aetna and not having to do with the CVS acquisition of Aetna.

Crucially, Plaintiff does not name that the Aetna Directors knew about any of the alleged misrepresentations. In fact, Plaintiff pleads at paragraph 101 of their Complaint that the truth was known within CVS. It doesn't say the truth was known within Aetna, you know, and for this reason, your Honor, in the *Fire Fighters* case the plaintiffs didn't even try to bring claims against the Aetna Directors and for good reason.

I will say that we made these arguments on a motion to dismiss before the Plaintiffs here tried to replead and didn't add any substantive allegations against the Aetna Directors. The suggestion that the

Aetna Directors should be responsible for any of the alleged misstatements or omissions is just wrong, and Plaintiffs have not put forward any facts to suggest that they should be.

So just quickly, your Honor, to go through the buckets of claims, the first claim against the Aetna Directors is a Section 14(a) claim. That claim, in addition to the argument that there are no misstatements or omissions, that claim, your Honor, should be dismissed because there's no allegation that the Aetna Directors knew or should have known. And there's a debate in the briefing about whether the standard for a Section 14(a) claim under the Exchange Act is scienter or negligence. We submit that scienter is the better reading. Circuit courts have held that, and more consistent with the trend of the Supreme Court to construe implied private rights of action very narrowly; so we think scienter should be the standard here, in which case the Plaintiffs have pled themselves out of court because they allege that there's no fraud.

But even if the standard is lower in negligence, this Complaint just doesn't get there. There are no particularized allegations about what the Aetna Directors knew or should have known that would at all satisfy at the pleadings stage an allegation that they

acted negligently in connection with the disclosures here. They're directors of a separate publicly-traded company; not CVS, not Omnicare.

In addition to the Section 14(a) claim, there's also a Section 20(a) claim for control-person liability against all of the Aetna Directors. That claim is premised on the idea that the Aetna Directors somehow controlled the disclosures or controlled CVS. We think that's facially implausible in this case. Aetna was being acquired by CVS. There's no possible way that the directors of Aetna would have controlled CVS or controlled its disclosures. So we think that the 14(a)claim and a 20(a) claim under the Exchange Act should be dismissed as against the Aetna Directors under any set of circumstances.

And then finally, your Honor, there's some additional 33 Act, Securities Act claims against just one of the Aetna Directors. That is Mr. Bertolini, who is the former CEO of Aetna. We think those are facially deficient as well. There's a Section 1282 claim against Mr. Bertolini, but there's no allegation that he actually passed title or directly participated in the solicitation in connection with the sale of CVS securities.

There's a Section 11 claim against

Mr. Bertolini. That's pled against Mr. Bertolini on the allegation that he signed the registration statement, which he did not. That allegation is just wrong in the Complaint. Plaintiffs tried to amend it in their briefing, but they can't do that. They've had multiple chances to amend. We pointed out this weakness in their Complaint, and the Complaint only alleges that he signed the registration statement, which he did not.

And finally, there's a control-person claim against Mr. Bertolini, and again, the same argument as to the control-person argument under the Exchange Act. He did not control CVS. He was a director of a separate publicly-traded company and he's not a proper defendant on that claim either.

So unless your Honor has any questions, we submit that the Complaint should be dismissed in its entirety but certainly as against the Aetna Directors who do not belong in this case.

THE COURT: Thank you.

Mr. Jensen, what do you say to that?

(Overlapping speech)

MR. JENSEN: I apologize, your Honor. I think we covered all of these points well in our briefing and respectfully refer the Court to that. Given the hour,

I did want to respond very, very briefly to a few things that opposing counsel said, if that's okay with your Honor.

THE COURT: Sure.

MR. JENSEN: The first, your Honor, is on the question of scienter as a standard for Section 14. Defense counsel's position is quite radical; it's not in the statute. The vast majority of courts to have looked at the question have concluded that the standard is not scienter, and there's really no basis to impose that standard where it's not present in the text, and they haven't --

THE COURT: So does the First Circuit have anything that is instructive on this?

MR. JENSEN: No, it does not, your Honor.

THE COURT: Okay.

MR. JENSEN: And so there's no basis to impose a scienter requirement. This isn't a case where the statutory language matches any of the other statutes that have been found to have imposed the scienter requirements, such as Section 10(b). There's just nothing of the sort in Section 14. So I'll refer to our papers for more on that, including some numerous cases holding the same way.

I think stepping back for a second, counsel

started with the discussion of why are the Aetna Defendants in the case. Your Honor, this is an action brought on behalf of a class of Aetna investors, and the Aetna Directors and former Aetna CEO signed, authorized and permitted the use of their names in connection with proxy solicitations for the CVS-Aetna acquisition. Under Section 14(a) that is all that is required. This is squarely within Section 14(a).

But I think that there's maybe even more facts that really emphasize why they are appropriate defendants here, including that they represented that they conducted extensive due diligence in connection with this acquisition and they put that out there in the proxy solicitation that had their names and their unanimous endorsement. This is -- these representations mattered to the Aetna investors. They were counting on these directors who had the nonpublic due diligence to enable them to have an informed vote. And as my colleague Mr. Rizio-Hamilton explained, there were misstatements in those proxy solicitation documents and thus they were deprived the right to or vote.

With respect to the control-person claims, your Honor, I think that there's just a mistake in the premise of opposing counsel's argument here. The

premise of his argument seems to be that a control-person needed to control the, I guess the underlying, underlying bad act, the rollover practices or whatnot. That's not correct. The violation here was the transmission of the false and misleading proxy solicitation, and on that it's undisputable that the Aetna Directors and Aetna Defendants had the control of Aetna's authorization and issuance of the proxy containing the misrepresentations at issue. There's just no requirement that the Aetna Directors have control of CVS. They controlled Aetna, who put forward the authorization for the misleading proxy solicitation.

And I guess unless your Honor has any other questions, I respectfully submit that every other point was addressed in our briefing; and just given the time, I won't rehash them.

THE COURT: Okay. Thank you.

Ms. Collins, I'll give you briefly the last word if you need it.

MS. COLLINS: Very briefly, your Honor. We will address the recent Supreme Court case in briefing as you say, but just to set off the bat, it didn't change the law on Regulation S-K as to Section 11. It was a 10(b) case. So the New York Appellate Division and the

Rhode Island court that looked at the Regulation S-K claims in this case with these disclosures and dismissed them, that's all still good law.

THE COURT: Okay.

MS. COLLINS: And I submit far more persuasive and instructive than the *Silverstrand* case which involved FDA adverse events where they disclosed adverse events, but not that there were deaths. I think that's a little bit different than here we disclosed customer losses and Plaintiffs say we should have put a number on it. I think they don't point to any, any law under Regulation S-K or otherwise indicating a duty to disclose it in the way that they now think that it should have been disclosed.

Similarly on rollovers, again, they don't point to any law under Regulation S-K saying that you would have needed to have disclosed -- accused yourself of misconduct to disclose some trend when there's, there was no known litigation; and very different from the *City of Pontiac* disclosures where they were disclosing that the DOJ was looking into all of this stuff because they knew that. We didn't disclose it because we knew of the subpoena, that's what we disclosed; that's all the law requires.

And the very last point, Mr. Rizio-Hamilton

pointed to a couple of specific paragraphs in the Complaint about net, purported net losses or purported amounts billed to Medicare and Medicaid for the rollovers. I'd just ask your Honor if you think that that level of difference in the factual allegations would make a difference, that looking at what they actually pled in the Complaint in paragraphs 114 and 219 is not precisely how it was portrayed here, and so I just direct your Honor to the pleading. And I'm happy to go into more detail if you'd like, but also I know that you're ready to end.

THE COURT: All right.

So I'm going to allow you two weeks to submit no more than three pages on the recent Supreme Court case if you wish to, nobody is requiring you to, and we'll take the rest of it under advisement and get something out to you soon, okay?

MS. COLLINS: Thank you.

MR. RIZIO-HAMILTON: Thank you very much, your Honor.

MR. CHEPIGA: Thank you, your Honor.

THE COURT: Have a good day.

(Adjourned)

C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Denise P. Veitch_
Denise P. Veitch, RPR
Federal Official Court Reporter

May 9, 2024
Date